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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 945

MASSEY-FERGUSON LIMITED, a corporation,
Petitioner,

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. .....

MASSEY-FERGUSON LIMITED, a corporation,

Petitioner,

v.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, CASSIA EQUIPMENT CO., a corporation, ELLIOTTS INC., a corporation, CHISHOLM BROTHERS FARM EQUIPMENT CO., a corporation, and CHARLES W. BULLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Massey-Ferguson Limited, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on December 24, 1963.

Citations to the Opinions Below.

The opinion of the Court of Appeals is reported at 325 F. 2d 713 and is printed in Appendix B hereto, at p. 22. The opinion of the District Court is reported at 210 F.

Supp. 930, appears at page 42 of the printed record and is printed in Appendix B hereto at page 24.

Jurisdiction.

The judgment of the Court of Appeals was entered December 24, 1963 (R. 4); Appendix B, page 23. A timely petition for rehearing filed January 13, 1964, was denied January 24, 1964 (R. 6). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

This case presents an important question relating to proceedings under the antitrust laws which seriously affects both the extent of jurisdiction of the United States courts and international and domestic commerce. The question is:

Where a Canadian corporation transacts no business in the United States, may it be sued and served in a private antitrust suit in the United States solely because it controls and is able to "direct the detailed activities" of its wholly-owned subsidiary which transacts business and is found in the United States, where the subsidiary has also been named as a party, has appeared to defend and is capable of responding to any judgment which may be entered?

Statute Involved.

The statute involved is Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. §22 (1958), which so far as pertinent permits suing a corporate defendant in a private antitrust suit only where it "transacts business" and permits serving such a defendant only where it is "found." This statute is printed in Appendix A hereto at page 21.

Statement.

Petitioner, a Canadian corporation which manufactures and sells farm equipment and other products, and three of its subsidiaries were made defendants in a private antitrust action in the United States District Court for the District of Utah. Two subsidiaries,* United States corporations having substantial assets, appeared to defend the action. Petitioner and the remaining subsidiary, Massey-Ferguson Finance Company of Canada Limited, a Canadian corporation, were never served with process except through attempted service on agents of one of the United States subsidiaries, Massey-Ferguson Inc. Petitioner and its Canadian subsidiary moved to dismiss the action as to them because (1) neither of them transacted business in the district and hence could not be sued there, and (2) neither of them was found in the district and hence could not be served there (D. Ct. R. 41).** The motion was granted as to the subsidiary but denied as to Petitioner.

The District Court certified that the denial of the motion involved "a controlling question of law as to which there is substantial ground for difference of opinion," (D. Ct. R. 58) and the Court of Appeals accepted an appeal from the denial of the motion. In a three-sentence opinion the Court of Appeals then held that because of "interlocking and integrated control . . . the appellant Canadian corporation was enabled to and did direct the detailed activities of the American corporation [Massey-Ferguson Inc.], including the operation of company stores in both Utah and Idaho;

* One of the subsidiaries, Massey-Ferguson Finance Corporation, is a subsidiary of the other, Massey-Ferguson Inc.

** References to "D. Ct. R." refer to the transcript of record of proceedings before the District Court, which is included in the record filed herewith.

. . .' and that it was, therefore, transacting business and found through its subsidiary within the District." 325 F. 2d 13, Appendix B, p. 22. A petition for rehearing asserting a clear conflict between this holding and rulings of this and other Courts was denied without explanation.

The operative facts are:

1. Petitioner, Massey-Ferguson Limited, is a holding company which manufactures and supplies farm equipment in Canada and for export and holds stock in a number of other corporations which manufacture and sell farm equipment throughout the world.

2. One of Petitioner's wholly-owned subsidiaries is Massey-Ferguson Inc. (hereinafter referred to as "the American company"). The American company is a Maryland corporation qualified to do business in most states of the United States, including Utah. Several officers and directors of Petitioner sit on the Board of Directors of the American company. The American company was made a defendant in this action, has appeared herein, and is actively engaged in the defense of the litigation. The American company, which is one of the leading farm machinery companies in the country, manufactures farm equipment at three plants in the United States. It distributes equipment manufactured by it and some equipment purchased from Petitioner and others through over 2,000 independent retailers and 34 retail stores (D. Ct. R. 13-18). The gravamen of this litigation is plaintiffs' charge that farmers allegedly are able to obtain excessively generous trade-in allowances at the American company's retail stores in Utah and Idaho to the alleged detriment of plaintiffs who distribute or deal in Ford, International Harvester and Deere farm equipment (D. Ct. R. 1-7).

3. The assets of the American company exceed $165 million. The damages claimed in this litigation are less than $3 million.

4. The District Court accepted plaintiffs' contention that through "commingled control" Petitioner was transacting business in the district "through its wholly-owned subsidiary." 210 F. Supp. at 932, Appendix B, p. 29. It was found that Petitioner exerted this control and directed the detailed activities of the subsidiary, including operation of the company stores, through an organizational unit called "North American Operations." "North American Operations" was stated to be a device permitting common officers of Petitioner and the American company "to meet together at a higher echelon to afford common direction to all North American operations." 210 F. Supp. at 937, Appendix B, p. 38. A vice-president of Petitioner, who is also the president of the American company, is "general manager" of the group of employees comprising North American Operations. Several of the American company's vice-presidents also direct the North American Operations unit. Part of the staff of this unit is on the payroll of Petitioner, and the American company reimburses Petitioner for part of the expenses of this unit. The overall administrative planning concerning retail stores is ultimately passed upon by personnel in this unit. A manual of operations governing the functions of such stores is formulated and kept up to date by North American Operations and some decisions governing the operation of such stores are referred to personnel in this unit. The District Court recognized that "common officers and directors ordinarily may not be regarded as demonstrating an unacceptable commingling of operations." 210 F. Supp. at 937, Appendix B, p. 37. But the court held this rule inapplicable on

the ground that the dual-position personnel who direct North American Operations do not function at separate times and under separate circumstances with regard to the respective businesses of Petitioner and the American company.

5. The formal and legal segregation of operations between Petitioner and the American company is beyond dispute. Petitioner and the American company maintain separate books, records and bank accounts, file separate tax returns, and all transactions between the two corporations are represented by appropriate entries in their respective books (D. Ct. R. 13-18). The District Court correctly found that property shipped into Utah by Petitioner was sold prior to shipment to the American company, 210 F. Supp. at 932, Appendix B, p. 29.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in conflict with applicable decisions of this Court.

A. Venue.

The decision of the Court of Appeals, which is expressly based on Petitioner's control over its American subsidiary, is in conflict with the decision of this Court in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). In *Cudahy* this Court held that for jurisdictional purposes, the corporate veil will not be pierced where there are actual separate corporate entities, and therefore that the degree of control exercised by the parent corporation has "no legal significance." 267 U. S. at 337.

In the *Cudahy* case this Court unanimously affirmed the District Court decision quashing service and dismissing the complaint. The District Court opinion, which thoroughly details the facts, clearly shows the practical business control of the parent over its subsidiary. 292 Fed. 169 (W. D. N. C. 1923). The completeness of the control exercised by the parent in *Cudahy* is shown by the opinion of the Supreme Court:

> "Through ownership of the entire capital stock and otherwise, the defendant dominates the . . . [subsidiary], *immediately* and *completely;* and exerts its control both *commercially* and *financially* in *substantially the same way*, and *mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated* which are established to market the Cudahy products in other states. The existence of the . . . [subsidiary] company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws." 267 U. S. at 335. (Emphasis added.)

This Court recognized in the *Cudahy* case that "the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate" than in previous cases. Nevertheless, the degree of control was held to be of "no legal significance" because the corporate separation "though perhaps merely formal, was real," and "was not pure fiction." 267 U. S. at 337. The authority of

Cudahy was reaffirmed in *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85 (1933), and *United States* v. *Scophony Corp.*, 333 U. S. 795 (1948).

The decision of the Court of Appeals is flatly inconsistent with *Cudahy's* holding that the degree of control is immaterial:

> "... by reason of its interlocking and integrated control of 'North American Operations,' the appellant Canadian corporation was enabled to and did direct 'the detailed activities of the American corporation, including the operation of company stores in both Utah and Idaho; ...' and ... it was, *therefore*, transacting business and found through its subsidiary within the District." (325 F. 2d at 714, Appendix B, p. 23). (Emphasis added)

The opinion of the Court of Appeals does not indicate the basis for its failure to follow the *Cudahy* case, although the petition for rehearing requested the Court to indicate the basis for its apparent disagreement with the authorities, including *Cudahy*, which had been cited.

Businessmen in the United States and abroad need to know whether *Cudahy* is still the law. Only this Court can tell them.

B. Service of Process.

No attempt was made to serve an officer or agent of Petitioner. The purported service was made only by serving officers and agents employed by the American company. The *Cudahy* doctrine prohibits such service.

Moreover, the Court of Appeals did not consider the differences in the requirements necessary to sustain venue and service of process. So far as pertinent here, Section 12 of the Clayton Act provides that a defendant may be sued only in a district where it "transacts business" and

may be served only where it is "found." The requirement of being "found" in the jurisdiction demands a greater showing of activity than does the "transacts business" requirement. *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79 (1918); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927); *United States* v. *Scophony Corp.*, 333 U. S. 795 (1948). The Court of Appeals, however, did not differentiate between the two requirements and additional proof was not required to sustain the attempted service of process.

II.

The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals and with decisions of the District Courts.

The decision of the Tenth Circuit which Petitioner asks this Court to review is contrary to the decisions of other Courts of Appeals, which have applied the *Cudahy* doctrine in rejecting efforts to pierce the corporate veil for purposes of venue and service of process under various statutes.

In *Manville Boiler Co. v. Columbia Boiler Co. of Pottstown*, 269 F. 2d 600 (4th Cir. 1959), a local affiliate was "extensively controlled" and its "policies and activities" were directed by an out-of-state corporation or its stockholders. Advertising suggested a unitary business. Nevertheless, the out-of-state corporation was not subject to suit because the local affiliate's place of business could not be considered as the out-of-state corporation's "regular and established place of business" and venue was improper under 28 U. S. C. §1400(b). The court stated:

> "Decision on the venue question is controlled by *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, 45 S. Ct. 250, 69 L. Ed. 634. If the rule of that case unduly emphasizes the form in which related corporations cast their intercorporate transactions and minimizes the control exercised by the one on the other, the rule, nevertheless, is well established. See *Harris* v. *Deere & Company*, 4th Cir. 223 F. 2d 161; *Berkman* v. *Ann Lewis Shops, Inc.*, 2 Cir. 246 F. 2d 44; 18 Fletcher, Cyclopedia Corporations, §8773. As this Court observed in *Harris* v. *Deere & Company, supra*, we cannot change or modify the rule, for any possible reconsiderations of its decision is the province of the Supreme Court." *Manville-Boiler Co.* v. *Columbia Boiler Co.*, 269 F. 2d 600, 606 (1959).

In *Harris* v. *Deere and Company*, 223 F. 2d 161 (4th Cir. 1955) the second largest farm equipment manufacturer, distributing products through 20 subsidiaries, was held not "doing business" in the district through its subsidiary, so as to be susceptible to service of process, although by use of common officers and directors the parent completely controlled and directed the policies and activities of the subsidiary and integrated its activities into the parent organization, and even described the subsidiary as a "branch house." 223 F. 2d at 162.

In *Gravely Motor Plow & Cultivator Co.* v. *H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951), a parent which sold tractors to a subsidiary for resale and exercised control through common officers and directors was held not subject to service of process in a district where only the subsidiary did business.

Among the other decisions which have applied the rule of the *Cudahy* case are a great many district court deci-

sions.* These decisions are of particular importance because district court decisions on this subject are rarely reviewed.

Thus the scope and application of the *Cudahy* doctrine is a recurring problem for the lower courts, and deserves the consideration of this Court.

III.

Unless corrected by this Court the decision of the Court of Appeals will effect an extraordinary expansion of the jurisdiction of the Federal Courts.

The Court of Appeals has held that a parent corporation "transacts business" and is "found" within the meaning of Section 12 of the Clayton Act wherever it controls a subsidiary and directs its detailed activities. Since there are few well-managed parent corporations which do not furnish specialized advice to subsidiaries, and otherwise assist in their activities, the practical result of the Court of Appeals' decision, contrary to the decisions of other federal courts, is that the jurisdiction of the District Courts is extended to parent corporations no matter how distant

* *E.g., Hudson Minneapolis Inc. v. Hudson Motor Car Company*, 124 F. Supp. 720 (D. Minn. 1954); *Strauss Motors, v. Standard Triumph Motor Co.*, 130 F. Supp. 789 (S. D. N. Y. 1955); *Anderson v. British Overseas Airways Corp.*, 144 F. Supp. 543 (S. D. N. Y. 1956); *Stetson China Co. v. D. C. Andrews & Co.*, 9 F. R. D. 135 (N. D. Ill. 1948); *American Fire Prevention Bureau, v. Automatic Sprinkler Co. of America*, 42 F. Supp. 220 (S. D. N. Y. 1941); *Berghall v. Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954). Several district courts specifically have applied the *Cudahy* rule in antitrust cases arising under Section 12 of the Clayton Act: *Terre Corporation Ltd. v. Ideal Cement Co.*, 117 F. Supp. 441 (D. C. Neb. 1954); *Austad v. United States Steel Corp.*, 141 F. Supp. 437, 439 (N. D. Cal. 1956); *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N. D. Ill. 1950); *Laylor v. National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950).

from the forum. Not only parent corporations of sister states but also parent corporations of foreign countries, as in the present case, are made subject to the jurisdiction of the District Courts. For the traditional test requiring that the parent corporation itself be within the district, the Court has substituted the test of *de facto* control over a subsidiary which does business within the district.

An immediate consequence of the Court of Appeals' decision is vastly to expand the number of defendants who may be forced to defend a single private antitrust action. Nonresident parent corporations of corporate defendants will be named as co-conspirators and made parties as a matter of course. Additional nonresident corporate defendants will be joined on the ground that a subsidiary transacts business within the district.

The reports of the Administrative Office of the United States Courts attest to the ever growing volume of private antitrust litigation.* In this increasingly important and burdensome field of federal jurisdiction rulings affecting the breadth of jurisdiction of the courts are particularly worthy of the attention of this Court.** The scope of much private antitrust litigation in the federal courts may otherwise be determined for years to come by a three-sentence opinion of a single Court of Appeals.**

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* According to the Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1962, 2,005 private antitrust cases were commenced during the fiscal year. These cases probably represented the largest single category of private federal question litigation.

Each antitrust case also tends to require more of the court's time than other types of cases. For example, of the 23 civil cases terminated during the fiscal year which required twenty or more trial days, nine were antitrust cases. Five antitrust cases required over forty trial days. (Table C9) It is common experience that the more parties there are in a case the longer it takes to try it.

** In its petition for rehearing, Petitioner requested the Court of Appeals to amplify its opinion in view of the recognized importance

The need for review by this Court is the more pressing in light of the fact that appellate decisions on this subject are rare. Decisions asserting jurisdiction are seldom reviewable unless the District Court, as in this case, certifies pursuant to 28 U. S. C. §1292(b) that its order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and the Court of Appeals recognizes the importance of the questions presented by exercising its discretion to permit an interlocutory appeal. If interlocutory appeal cannot be had, the issues of venue and service lose their significance. If the case reaches final judgment, the non-resident defendant will by that time have been already forced to bear the non-recoverable expenses and burdens of participation in litigation. Moreover, if the result is favorable, there is no ground to appeal; and if the result is unfavorable there is little reason to appeal on the issues of venue and service where, as here, a subsidiary corporation is properly before the Court and fully able to respond to the judgment.

Accordingly, it is respectfully urged that this Court now assert its jurisdiction to consider whether the test of "control," as laid down by the Court of Appeals, or the traditional tests, should determine the future course of private antitrust litigation in this country.

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of the issue presented not only to this case but to all cases involving out-of-state parent corporations. It was noted that counsel had been instructed to prepare a petition for certiorari if the decision was not modified. Nevertheless, the Court of Appeals did not modify or amplify its opinion.

IV.

The answer to the question presented will have significant effect on foreign and domestic commerce.

Business in distant states and in foreign countries is of course generally conducted through subsidiaries. The Court of Appeals' decision requires a parent corporation, if it controls the activities of its subsidiary, to stand trial as an alleged joint tortfeasor with the subsidiary.

The practical result is that antitrust claims against subsidiaries are readily translatable into claims against the parent corporation by virtue of the exercise of business control by the parent, even though the subsidiary has been adequately capitalized to satisfy all legitimate claims against it. This result casts doubt upon the validity in practice of the widely-understood concept that parent corporations are not liable on obligations of their subsidiaries.

Businessmen and their lawyers are in need of definite ruling as to the consequences of the establishment and control of subsidiaries. If the decision of the Court of Appeals is not reviewed, the business community will be left in doubt as to whether other courts will follow the lead of this Court of Appeals in withdrawing, for all practical purposes, one of the long-understood attributes of conducting business through corporate subsidiaries.

One District Court, in applying the *Cudahy* doctrine, quoted the following language from another Court:

> "... here is a field in which as much certainty and predictability as possible is to be desired. Many a business will open, or refrain from opening, an office in another state or expand or contract its activities there depending upon the opinion of counsel based upon court decisions as to whether the con-

templated activity crosses the nebulous 'doing business' borderline." *Simonson* v. *International Bank*, 184 F. Supp. 362, 364 (S. D. N. Y. 1960).

Petitioner was unable to move the Court of Appeals either to conform its decision to the generally understood law or to give reasons for its decision which would enable businessmen to plan how to avoid similar decisions in the future.

Petitioner, for example, is given no guidance as to how its business practices might be modified to avoid recurrence of such a decision. From the District Court's decision, it is made to appear that dual-position personnel must "function at separate times and under separate circumstances with regard to the respective businesses" of parent and subsidiary. 210 F. Supp. at 937, Appendix B, p. 37. Such a requirement is obviously impractical. It necessitates substantial waste of executive time and increase in number of executives. Attempting to comply with such a requirement would place Petitioner at a substantial competitive disadvantage vis-a-vis other farm equipment manufacturers. Indeed, one of Petitioner's most substantial competitors as a seller of farm equipment has been held not to be subject to ny such requirement. *Harris* v. *Deere and Company, supra.* The Court of Appeals, however, has neither rejected such requirement nor indicated any substitute for it.

In its petition for rehearing and clarification, Petitioner stated:

> "Appellant respectfully petitions the Court for a rehearing *en banc* and clarification of its opinion filed December 24, 1963. This Court's decision is based upon its agreement with the District Court that:

'. . . the appellant Canadian corporation was enabled to, and did direct "the detailed activities of the American corporation, including the operation of company stores in both Utah and Idaho . . ." and that it was, therefore, transacting business and found through its subsidiary within the District.' (Per Curiam Opinion, p. 2)

It thus appears that this Court has, for some reason not indicated by its opinion, chosen not to follow the rule established by the Supreme Court in the case of *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). In *Cudahy* the Supreme Court found that:

'Through ownership of the entire capital stock and otherwise the defendant dominates the Alabama corporation, immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other states.' 267 U. S. at 335.

The holding of the Supreme Court was, nevertheless, that the parent corporation was not subject to suit in the district where its subsidiary was doing business.

"The District Court found that this case involves a controlling question of law as to which there is substantial ground for difference of opinion, and by acceptance of the appeal this Court recognized the importance of the issues presented. Under the circumstances it is respectfully requested that this Court reconsider *en banc* this question in the light of the controlling authorities presented and enlarge its opinion to indicate the basis of its decision."

Nevertheless, the Court of Appeals adhered to its three-sentence decision. Unless this Court grants certiorari, there is, for the reasons stated above, little likelihood that the issue will be clarified for businessmen and their lawyers.

In addition to the need for a decision of this Court to enable lawyers to advise clients with definiteness as to basic business decisions, there is a further need for this Court to consider the effect of the application of Section 12 of the Clayton Act to parent corporations of foreign countries. Nearly all civilized countries, including Canada, have procedures for collecting information for use in foreign litigation. Both the laws of the Dominion of Canada and the laws of the Province of Ontario, where Petitioner's principal office is located, provide for depositions of witnesses and production of documents for use in foreign proceedings, upon proper application to a Canadian court or judge, with the authorization of any court or tribunal of competent jurisdiction in any foreign country. Revised Statutes of Canada, Chapter 307, Section 42, 1962; Revised Statutes of Ontario, Chapter 125, Section 58 (Appendix C, p. 42). The holding of the Court of Appeals that Petitioner is subject to the jurisdiction of the Utah District Court, and therefore may be compelled to give depositions and produce documents to plaintiffs without any request by the Utah court to the Canadian court, circumvents the traditional Canadian process for obtaining testimony for use in foreign proceedings.

Indeed, as the subsidiary is financially responsible, and no claims are directed against the parent which are not also directed against the subsidiary, such circumvention is the only consequence of holding the Canadian company subject to suit. Inasmuch as the Canadian statutes referred to above vest discretion in the Canadian courts as to compliance with requests of foreign courts, bypassing the

Canadian courts thwarts the power of such courts to protect their nationals from what they may consider as undue harassment.

In the past, Canadian authorities have reacted strongly to actions considered by them to impinge on Canadian sovereignty.

As a result of the issuance of a grand jury subpoena, described in *In re Grand Jury Subpoena Duces Tecum*, 72 F. Supp. 1013 (S. D. N. Y. 1947), the Ontario legislature passed a statute prohibiting the removal from Ontario of records relating to business carried on in Ontario, pursuant to any requirement of a legislative, administrative or judicial authority of a foreign jurisdiction. Revised Statutes of Ontario, Chapter 44, 1960 (Appendix C, p. 45). In presenting this statute to the Ontario legislature, the Premier of Ontario stated:

> "I trust no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as is any citizen of their own country. I hope that the Government of the United States will see fit to withdraw these proceedings and follow the course which is in keeping with the close international friendship which has been an example to the whole world." See Appendix C, p. 43.

In a speech before the New York State Bar Association, Section on Antitrust Law, the Minister of Justice and the Attorney General of Canada referred to a number of pending Government antitrust proceedings and stated:

> "While we in Canada are genuinely and deeply concerned over the threat to our sovereignty over Canadian commerce, and while I wish to make it clear that the Canadian Government regards it as a primary obligation to preserve such sovereignty, we

share the aversion which I know you feel to that sort of action.

> "... Not every problem is capable of satisfactory solution by a repeated insistence on the application to it of preconceived formulae. Particularly is this true in cases where international relations are involved, and in situations where actions at home are bound to have extraterritorial effects." 1959 Antitrust Law Symposium, Proceedings of the New York State Bar Association, page 49.

The Court of Appeals would multiply the number of such problems, by permitting them to arise not only whenever the Attorney General of the United States, after consultation with the Secretary of State, deems action necessary to enforce the antitrust laws in spite of any extraterritorial effect, but also whenever a private litigant sees a procedural advantage in joining a Canadian or other foreign parent corporation as an additional party to a litigation.

This Court, however, has recognized that the implications of extending the confines of jurisdiction beyond the confines of the United States are to be taken into account in the application of our laws:

> "... in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its laws to an American transaction." *Lauritzen* v. *Larsen*, 345 U. S. 571 at 582 (1953).

Petitioner indicated unavailingly to the Court of Appeals that the investment of American companies in

subsidiaries abroad is enormous, including hundreds of millions of dollars invested in Canadian subsidiaries. The substantial public interest in the consequences of any decision that disturbs the normal relationship between parent and subsidiary corporations of the United States and Canada, and the application of Section 12 of the Clayton Act to such relationships thus deserves the attention of this Court.

Conclusion.

This case presents national issues pertaining to judicial procedure under the antitrust laws. The resolution of these issues is vital to the Petitioner and of great importance to the efficient administration of justice, to the business world and to our relations with other nations.

Petitioner prays that the writ of certiorari be granted and the judgment of the court below be reversed.

Respectfully submitted.

JOHN F. SONNETT
DENNIS MCCARTHY
Counsel for Petitioner

Of Counsel:

JOHN A. EVANS
WILLIAM T. LIFLAND
L. R. GARDINER, JR.

Dated: March 23, 1964.

APPENDIX A

Section 12 of the Clayton Act (15 U. S. C. §22.)

"§ 22. *District in which to sue corporation*

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. Oct. 15, 1914, c. 323, §12, 38 Stat. 736."

APPENDIX B

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NOVEMBER TERM—1963

MASSEY-FERGUSON LIMITED, a corporation, Appellant, *vs.* INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation; CASSIA EQUIPMENT CO., a corporation; ELLIOTTS INC., a corporation; CHISHOLM BROTHERS FARM EQUIPMENT CO., a corporation and CHARLES W. BULLEN, doing business as BULLEN FARM EQUIPMENT COMPANY, Appellees.	No. 7278

Appeal from the United States District Court for the District of Utah, Central Division.

Before MURRAH, Chief Judge, and HILL and SETH, Circuit Judges, *Per Curiam*

The question presented on this interlocutory appeal in an antitrust suit is whether the appellant Canadian corporation was, as the trial Court held, transacting business and found within the District of Utah, so as to be amenable to venue and process in that District, under Section 12 of the Clayton Act, 38 Stat. 738, 15 U. S. C. §22.

We agree with the trial Court that by reason of its interlocking and integrated control of "North American Operations," the appellant Canadian corporation was enabled to and did direct "the detailed activities of the American corporation, including the operation of company stores in both Utah and Idaho; * * *" and that it was, therefore, transacting business and found through its subsidiary within the District. *Intermountain Ford Tractor Sales Company, a corporation, et al. v. Massey-Ferguson Limited, a corporation, et al.*, 210 F. Supp. 930, 939.

The judgment of the trial Court is AFFIRMED.

Judgment of Court of Appeals.

Judgment.

Thirtieth Day, November Term, Tuesday, December 24th, 1963.

Before Honorable ALFRED P. MURRAH, Chief Judge, and Honorable DELMAS C. HILL and Honorable OLIVER SETH, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Opinion of the District Court.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a Corporation; Cassia Equipment Co., a Corporation, Elliotts Inc., a Corporation, Chisholm Brothers Farm Equipment Co., a Corporation, and Charles W. Bullen, doing business as Bullen Farm Equipment Company, Plaintiffs,

v.

MASSEY-FERGUSON LIMITED, a Corporation; Massey-Ferguson, Inc., a Corporation; Massey-Ferguson Finance Company of Canada, Limited, a Corporation; and Massey-Ferguson Finance Corporation, a Corporation, Defendants.

No. C 160-61.

UNITED STATES DISTRICT COURT

D. UTAH,

CENTRAL DIVISION.

Nov. 9, 1962.

Retail farm equipment dealers doing business in Idaho and Utah brought an antitrust suit in the United States District Court for the District of Utah against a Canadian corporation, its American subsidiary, and others. The Canadian corporation appeared specially and made a motion to dismiss the action and quash return of service of summons as to it on ground that it was not an inhabitant of, or found, or transacting business within the district of Utah, and was not subject to suit or service of process within the district of Utah. The District Court, Christensen, J., held that the Canadian corporation's connection with Utah operations was sufficient to show that it transacted business in Utah so as to be suable in the district of Utah, and that the Canadian corporation was found in the districts of Utah, Idaho, or Michigan where service of

process was attempted through service on officers and agents of the American subsidiary so as to sustain service of process on the Canadian corporation.

Motion to dismiss and quash return of service and service of process as to Canadian corporation denied.

1. Monopolies.

Mere fact that shipping documents covering equipment sold by Canadian corporation to American subsidiary showed that Canadian corporation was shipper and mere fact that on occasion equipment went directly to local stores or customers of subsidiary did not establish that Canadian corporation was transacting business directly in district of Utah where some local stores were located so as to be suable in antitrust suit in federal district court in Utah. Sherman Anti-Trust Act, §§1, 2, 15 U. S. C. A. §§1, 2; Clayton Act, §§2(a), 12 as amended 15 U. S. C. A. §§13(a), 22.

2. Monopolies.

Alleged fact that alleged conspiracy of Canadian corporation and American subsidiary had impact within district of Utah did not establish that Canadian corporation was transacting business in district of Utah so as to be suable in anti-trust suit in federal district court in district of Utah. Sherman Anti-Trust Act, §§1, 2, 15 U. S. C. A. §§1, 2; Clayton Act, §§2(a), 12 as amended 15 U. S. C. A. §§13(a), 22.

3. Monopolies.

Canadian corporation had sufficient connection with Utah operations of American subsidiary so that Canadian corporation transacted business in district of Utah and was suable in antitrust suit in federal district court in Utah, where common officers of Canadian corporation and sub-

sidiary met together at higher echelon to afford cominon direction to all North American operations of Canadian corporation and to lay down detailed instructions concerning operation of stores including stores in the district of Utah, and Canadian corporation for various services rendered to subsidiary made service charges against subsidiary. Sherman Anti-Trust Act, §§1, 2; 15 U. S. C. A. §§1, 2; Clayton Act, §§2(a), 12 as amended 15 U. S. C. A. §§13(a), 22.

4. Monopolies.

Canadian corporation was found in districts of Utah, Idaho or Michigan where service of process was attempted through service on officers and agents of its American subsidiary in connection with antitrust suit in federal district court in Utah, where as to certain local operations of American subsidiary there was such intermixture of operational control by Canadian corporation apart from regular channels of corporate management as to obscure, if not entirely obliterate separation of corporate identities. Sherman Anti-Trust Act, §§1, 2; 15 U. S. C. A. §§1, 2; Clayton Act, §§2(a), 12 as amended 15 U. S. C. A. §§13(a), 22.

5. Corporations.

Corporation is not amenable to suit in federal court of another state merely because it employs and controls wholly owned and subsidiary corporation as instrumentality for doing business there, and for contrary result local business of foreign corporation must be of such character as to warrant inference that foreign corporation has subjected itself to local jurisdiction and that it is by its duly authorized officers and agents present within district where service is attempted.

RAWLINGS, WALLACE, ROBERTS & BLACK, Salt Lake City, Utah, JOSEPH L. ALIOTO, San Francisco, Cal., for plaintiffs.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY, Salt Lake City, Utah, for defendants.

CHRISTENSEN, District Judge.

The plaintiffs are retail farm equipment dealers doing business in Idaho and Utah.

The defendant Massey-Ferguson Inc. is a Maryland corporation qualified to do business in most states of the United States, including Utah. It manufactures and distributes farm and industrial equipment and operates certain company stores in Utah and Idaho which are involved in plaintiffs' claim. Massey-Ferguson Finance Corporation, a Maryland corporation, is a wholly owned subsidiary of Massey-Ferguson Inc. The home offices of both Massey-Ferguson Inc. and Massey-Ferguson Finance Corporation are in Detroit, Michigan, although their principal officers reside in Canada. Massey-Ferguson Limited is a corporation organized under the laws of Canada. It is a manufacturer and supplier of farm and industrial equipment and owns all of the stock of Massey-Ferguson Inc. Massey-Ferguson Finance Company of Canada Limited is a subsidiary of Massey-Ferguson Limited. Neither of the Canadian companies is qualified to do business in the United States.

The plaintiffs charge in this suit that defendants have attempted to monopolize, and have entered into a combination and conspiracy to restrain and monopolize, trade in agricultural and industrial equipment to plaintiffs' damage, in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§1, 2) and Section 2(a) of the Clayton Act (15 U. S. C. §13(a)).

Massey-Ferguson Limited and Massey-Ferguson Finance Company of Canada Limited, appearing specially for the purpose have moved the court to dismiss the action and quash the return of service of summons as to each, upon the grounds that neither defendant was an inhabitant

of, or found or transacting business within, the district of Utah, and that it is not subject to suit nor to service of process within this district.

The motions obviously are well taken as to Massey-Ferguson Finance Company of Canada Limited, and therefore are granted without further discussion.

Massey-Ferguson Inc. as indicated is the solely owned subsidiary of Massey-Ferguson Limited. Except for three circumstances to be discussed hereinafter, the relationship between this parent company and its subsidiary appears substantially the same as that which was found to exist between Cudahy Packing Company, a Maine corporation, and Cudahy Packing Company of Alabama in Cannon Mfg. Co. *v.* Cudahy Packing Co., 267 U. S. 333, 45 S. Ct. 250, 251, 69 L. Ed. 634[1]. In the absence of distinguishing circumstances the decision in the Cudahy case could well be controlling here against the plaintiffs' position.

Plaintiffs, however, advance three contentions which are said to preclude application of the Cudahy doctrine: (1) that the Canadian corporation was directly doing business within the district of Utah because as shipper it sent goods into the state which were directed not to its subsidiary as the purchaser but to the stores operated by the subsidiary or to other dealers; (2) that it entered into a conspiracy

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[1] "The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the state; but it does not do so as defendant's agent. It buys from the defendant and sells to dealers. In fulfillment of such contracts to sell, goods packed by the defendant in Iowa are shipped direct to dealers, and from them the Alabama corporation collects the purchase price. Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated, which are established to market the Cudahy products in other states. The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. * * *

with its subsidiary either within the district or having an impact within the district and thus "transacted business" here; and (3) the Canadian company by commingled control was actually present in the district and transacted business here through its wholly owned subsidiary within the contemplation of 15 U. S. C. §22. These contentions will be examined in order.

There is no merit to the claim that because shipping documents covering equipment sold by the Canadian company to its subsidiary showed the Canadian company to be the "shipper" and because on occasion the equipment went directly to the local stores or the customers of the subsidiary, the Canadian company itself was transacting business directly in the district of Utah. The evidence indicates that property shipped into Utah by the Canadian company was sold prior to shipment to the subsidiary and that shipments were made as directed by the latter. Ordinary business practices completely removed from the local scene could not be so magnified in their supposed local effect without subjecting almost every foreign manufacturer to the consequences of local operations merely because their products eventually reach local dealers or consumers. The most loose concept of liberalized venue and service requirements would not countenance such result. And besides, as I read the Cudahy case a similar argument was clearly rejected there.

On the second point, plaintiffs call attention to language in United States v. Scophony Corporation, 333 U. S. 795, 68 S. Ct. 855, 862, 92 L. Ed. 1091 (1948)[2] on the basis of which

[2] "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'-'present'-'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the anti-trust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

they urge that the charged conspiracy itself sufficiently would constitute the transaction of business within the district as to afford venue and permit service of process. This view is supported more or less by the following authorities cited by plaintiffs' counsel: Giusti *v.* Pyrotechnic Industries, 156 F. 2d 351 (9 Cir. 1946); Steiner *v.* 20th Century-Fox Film Corporation, 232 F. 2d 190 (9 Cir. 1956); R. J. Coulter Funeral Home *v.* National Burial Ins. Co., 192 F. Supp. 522 (D. C. Tenn. 1960); De Golia *v.* Twentieth Century-Fox Film Corporation, 140 F. Supp. 316 (D. C. Cal. 1953); and Ross-Bart Port Theatre, Inc. *v.* Eagle Lion Films, Inc., 140 F. Supp. 401 (D. C. Va. 1954); cf. Bankers Life & Casualty Co. *v.* Holland, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953); and Bertha Building Corp. *v.* National Theatres Corp., 248 F. 2d 833 (2 Cir. 1957). The Giusti thesis to the effect that a conspiracy entered into or having impact within a particular district itself could sustain venue in that district under the antitrust laws is not impressive.[3] I cannot reconcile the broad but yet limited statutory rules on venue and service[4] with the idea that in effect there are no limitations as to venue and service in antitrust matters so long as the action is brought where a conspiracy was entered into or resulting damages occurred. Nor can I accede to the proposition advanced by the plaintiffs on the basis of DeGolia *v.* Twentieth Century-Fox Film Corporation, supra, that since the defendants' possible participation in the conspiracy cannot be ascertained before trial, and as such participation will determine whether defendants are doing business in the state, the plaintiff's complaint should not be dismissed nor process quashed at this stage but

[3] While expressions in Bankers Life & Casualty Co. *v.* Holland, supra, may be in a sense dicta, both the majority and the dissenting justices seem agreed that the Giusti theory is wrong.

[4] Section 12 of the Clayton Act (15 U. S. C. §22) provides: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

should a trial of the issues fail to establish defendants' participation in the alleged conspiracy, defendants may apply for appropriate relief. That would mean that as to every alleged conspiracy, irrespective of any other suggestion of venue, a case could proceed against a foreign corporation with the same effect as if venue were properly laid, until at least the time of trial, and that the validity of service of process and the propriety of the venue would vary according to the final decision on the merits. It is my opinion that the statute does not contemplate that a conspiracy having impact within the district shall itself constitute the transacting of business for venue purposes nor could the defendant be considered as "found" within the district or the purpose of service of process merely by reason of such a conspiracy.

No cases have been cited nor have I discovered any closely reading upon the third point, but established principles essential to a decision are reflected in Eastman Kodak Co. *v.* Southern Photo Materials Co., 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1929); United States *v.* Scophony Corporation, 333 U. S. 795, 68 S. Ct. 855, 92 L. Ed. 1091 (1948) supra; United States *v.* National City Lines, 334 U. S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584 (1948); People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587; Curtis Publishing Company *v.* Cassel, 302 F. 2d 132 (10 Cir, 1962).

Massey-Harris-Ferguson, Limited *v.* Boyd, 242 F. 2d 800 (6 Cir. 1957) is not of much help; recognized limitations of the remedy of mandamus precluded an authoritative decision upon the question with which we are concerned. On the other hand, the case apparently did not touch upon the effect of the "North American Operations Unit", hereinafter mentioned. It is true that the district judge ruled that for all intents and purposes there was only one corporation; the parent Canadian corporation, with the American company and affiliates being its adjuncts or instrumentalities, and that the activities and operations of the Canadian corporation were a continuous course of business of a substantial character within the Western District of Tennessee.

But this ruling, if not inferentially questioned in the Court of Appeals, certainly was not confirmed.

In the latter connection, there is evidence before me which raises a serious question whether the formal segregation of operations between the Canadian parent corporation and its American subsidiary has not been overridden by a device which the companies in common adopted apparently in an effort to avoid the normal operational consequences and limitations of that very separation.

The affidavit of A. A. Thornbrough, in support of defendants' motion to quash service of process, sets out some basic facts concerning the integrated control of the two corporations,[5] from which he concludes that the Cana-

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[5] It is shown by Mr. Thornbrough's affidavit that there is physically located in Toronto, Canada, an organizational unit denominated for convenience "North American Operations". The function and purpose of this organizational unit is to coordinate the activities of Massey-Ferguson Inc. in the United States and of that part of Massey-Ferguson Limited which carries on similar business activities in Canada. The President of Massey-Ferguson Inc., acts as general manager over the coordinating organization called "North American Operations". According to Mr. Thornbrough, although the manufacturing and sales activities in Canada and in the United States are coordinated through the general manager of North American Operations, his authority so far as Massey-Ferguson Inc. is concerned stems entirely from his position as President of Massey-Ferguson Inc. Massey-Ferguson Inc. reimbursed Limited in full for the amounts paid by Limited for services extended to Massey-Ferguson Inc. Employees who reside in Canada and who perform services partly for Massey-Ferguson Inc. and partly for that division of Massey-Ferguson Limited (which is claimed to be the Canadian counterpart of Inc.) are paid in Canadian funds by checks issued by Massey-Ferguson Limited. Thereafter Massey-Ferguson Inc. reimbursed Limited for that part of the amount paid which is properly allocable to services rendered on behalf of Massey-Ferguson Inc. Mr. Thornbrough alleges that prior to November 1959 the present autonomy of the North American Operations (including Massey-Ferguson Inc.) from the direction and authority of the corporate or staff authority of Massey-Ferguson Limited was not so clearly or definitely defined as at present. Prior to November 1959 some of the corporate or staff officers of Massey-Ferguson Limited participated to some extent in some of the decisions, policies and activities pertaining to North American Operations (including Massey-Ferguson Inc.). As of November

dian company officers in connection with the "North American Operations" concern themselves "exclusively with advising, consulting and coordinating the world-wide activities of Massey-Ferguson Limited and its subsidiaries," and "do not in fact exercise any direct operational control or authority over North American Operations or over Massey-Ferguson Inc. which carries on all business in the United States." Mr. Thornbrough is President of Massey-Ferguson Limited and is also a director of Massey-Ferguson Inc., the wholly owned subsidiary. Yet Mr. Thornbrough subsequently testified in his deposition that the "North American Operations" came into being on the first of November, 1959, and that about that time "generally the operations of the United States organization and the Canadian marketing activities were consolidated into an operational entitity." Mr. Dworshak became vice-president of marketing of Massey-Ferguson Inc. and "also director of marketing for both the Canadian and the U. S. overall activities." At the present time Mr. Staiger is vice-president and general manager of North American Operations; also president of Massey-Ferguson Inc. and an officer of Massey-Ferguson Limited. Mr. Pomeroy is director of marketing for "North American Operations" and vice-president of marketing for Massey-Ferguson Inc. Despite the conceptual uncertainties of the "North American Operations", it is quite manifest from Mr. Thornbrough's deposition that as a practical matter the parent company through the "North American Operations" directs the detailed activities of the American company, including the operation of company stores in both Utah and Idaho. I think that the reason the "North American Operations" appeared so complex when an attempt was made to

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1959, however, Mr. Thornbrough states that a policy was instituted to re-align corporate management or staff officers and to disengage these officers from all direct operational authority over North American Operations, including Massey-Ferguson Inc. Since the date mentioned, this has been the fixed policy and practice of the company, from which to the personal knowledge of the affiant there had been no deviation.

explain them[6] stemmed largely from failure to recognize that obvious control. This "North American Operations" appears to be not merely a council of officers from the respective corporations, each acting in separate capacities and with respect only to the particular corporation which he represents, but essentially another entity in which separate

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[6] (Cross examination of the witness Thornbrough on deposition)

"Q. I am frankly confused at this time. Does it follow from that that North American Operations in no way at all involve the Canadian Company?

"A. It does not involve the top management in Massey-Ferguson Limited.

"Q. Does it involve any kind of management whether it is top or otherwise?

"A. It involves what it says, North American Operations.

"Q. Since it involves what it says, namely North American Operations and since the company, Limited, that is Massey-Ferguson Limited, operates in North America, am I justified in concluding from that that Massey-Ferguson Limited performs activities which come under the general heading of North American Operations?

"A. No. You are not justified in making that comment.

"Q. Would you be good enough to clear that up for me?

"A. Massey-Ferguson Limited in its parent company activities operates only in Canada. So far as the United States is concerned all operations are carried out by Massey-Ferguson, Incorporated.

"Q. Insofar as Massey-Ferguson Limited operates in Canada, nowhere else, but in Canada, does it come within the scope of what has been called the division or branch quote *North American Operations* end quote?

"A. That portion of a Massey-Ferguson Limited activities which are encompassed in the North American Operations would be performed in Canada.

"Q. They would be performed in part by Mr. Staiger?

"A. As general manager of the North American Operation, yes.

"Q. Now would they not also be performed in part by Mr. Pomeroy as a sales manager?

"A. As director of marketing for both the Canadian and North American activities.

"Q. It is clear that Mr. Pomeroy and Mr. Staiger performed services that benefited both companies, that is, Limited and Inc., isn't that so?

"A. They carried responsibilities for Massey-Ferguson, Inc., and they also carried responsibilities for the operations in Canada as a part of the corporate entity of Massey-Ferguson Limited."

corporate functions are merged in many respects, employing as such numerous assistants and employees and often acting directly with subsidiary corporate activities rather than through the top management of the respective corporations. Mr. Staiger, president of Massey-Ferguson, Inc., and president of North American Operations testified on deposition that he reported directly to Mr. Thornbrough, president of Massey-Ferguson Limited, and that of the several hundred employees on the staff of North American Operations two-thirds were on the Canadian company's payroll.

I cannot subscribe to the theory that direct and detailed control of a subsidiary by a parent corporation can be avoided in its detrimental consequence but utilized in its favorable effects by having the Canadian personnel from the parent company wear a hat labeled "subsidiary" when giving directives to the subsidiary on behalf of the parent company or on behalf of the joint management of such parent and subsidiary,[7] based upon decisions and policies

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[7] The following colloquy occurred during oral argument:

"The Court: Now, North American Operations isn't a separate corporation?

"Mr. McCarthy: It is not. It's just an organizational unit, consisting of * * * two things. It consists of Massey-Ferguson Inc., and it consists of the comparable activities which are carried on by 'Limited' solely in Canada; namely, marketing and manufacturing, chiefly. They in effect think of it as three—that they in effect have three corporations, although in fact there isn't the division in 'Limited' that there is as far as 'Inc.' is concerned.

"The Court: Well, Mr. Alioto thinks they in fact think they have one * * *

"Mr. McCarthy: In their thinking, they have three. The three consist of, first, the holding company, Massey-Ferguson, Ltd., consisting of the corporate and staff officers, as they are referred to, which on a coordinating and consultative and advice basis, in effect supervised the worldwide affairs of Massey-Ferguson, Ltd. But these same corporate or staff officers do not exercise any direct operational control or direction over the activities of North American Operations. North American Operations is run separate and apart from the corporate or staff officers of 'Limited,' and it is, as I say, it's in a different location, and it consists of a segment. In fact, a segment which in effect has been carved off of 'Limited,' a segment comparable in some respects to the activities of 'Inc.'

actually made and transmitted to local operational personnel by the officers and directors of the parent company.

It must be recognized that plaintiffs' complaint centers around the company stores operated by Massey-Ferguson

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"The Court: Now, did this staff set up, promulgate, plaintiffs' Exhibit 21 (Retail Store Operations Manual)

"Mr. McCarthy: No. That's the Operations Manual. That's promulgated by North American Operations.

"The Court: Well, that's the staff?

"Mr. McCarthy: No. That's distinguished from what I referred to as the corporate or staff officers of 'Limited.'

"The Court: Well, it's an amalgamation of the two—

"Mr. McCarthy: As I said, they think of it as three entities. One is the corporate or staff officers, which is in a higher echelon of advice and so on, as to the worldwide operations. The operational group is North American Operations, which consists of 'Inc.,' consists of the top officers of Massey-Ferguson, Inc., and comparable officers of 'Limited' • • •

"The Court: All right. But that combination • • •

"Mr. McCarthy: That is correct.

"The Court: Both 'Limited' and 'Inc.'?

"Mr. McCarthy: That is, it controls the operations of 'Inc.'—

"The Court: In its sphere?

"Mr. McCarthy: In its sphere and it controls the operations of that portion of 'Limited' which does comparable business in Canada • • •

"The Court: Are each of the officers who take part in this North American • • • Operations—common officers of 'Inc.' and 'Limited'?

"Mr. McCarthy: They are officers of both, but not always in the same capacity. Mr. Staiger, for example, is president of Massey-Ferguson, Inc., and there is also a director of North American marketing activities, who is a vice president of Massey-Ferguson, Inc.—

"The Court: So when they approve this manual as it might affect the United States company, they are acting in their United States capacity—

"Mr. McCarthy: That is correct, your Honor.

"The Court:—and have that hat on. And then when they approve it in its other aspect, they are acting—

"Mr. McCarthy:—with that hat on. They are in effect coordinating the marketing and manufacturing activities for both Canada and for the United States, and they function in a capacity as an officer of 'Inc.' when it pertains to the United States, and they function in the capacity as an officer of 'Limited' in a limited sphere when they are approving it for Canadian activities."

Inc. in Utah and Idaho. It does appear that the overall plan governing or substantially affecting the level of prices in these stores, while originating locally, is ultimately passed upon approved and controlled by the so-called North American Operations. It also is shown that a detailed Manual of Operations governing the functioning of the local stores in not only broad, but in minute respects, is formulated and kept up to date by the North American unit and that some of the decisions governing the operation of local stores are referred to, and directly passed upon by, officers of the North American Operations pursuant to the Manual.[8] In this context, it may be deemed significant that not a single officer of the American subsidiary resides in the United States. Most of the principal officers of the American company are also officers or directors of the Canadian company, and generally speaking these common officers direct the "North American Operations".

I am not unmindful that common officers and directors ordinarily may not be regarded as demonstrating an unacceptable commingling of operations. But here they do not function at separate times and under separate circumstances with regard to the respective businesses. On the contrary, by the device of the North American Operations,

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[8] Plaintiffs' Exhibit 2. "Retail Store Operations Manual-Massey-Ferguson" is issued by North American Procedures and Systems. The forward to the Manual states: "The Retail Store Operations Manual is the collection of authorized communications relating to the control, administration and coordination of Retail Store Operations within the North American Operations Unit * * * Each supervisor who receives this Manual is responsible for understanding and adhering to the practices and procedures contained herein and for taking the necessary steps to insure that personnel under his jurisdiction are informed of the policies and procedures governing their day-to-day activities within the company." The manual among other things provides that salaries in excess of $10,000 for store operations are to be "authorized by the vice president North American Operations * * *." Copies of personnel attendance records are to be forwarded to the "Personnel and Industrial Relations Department, North American Operations". The form for "Status and Salary Change" has a space for the approval of "Operations Unit Department Head", and the "North American office Services Manager" is responsible for providing record retention schedules as they develop.

common officers of both meet together at a higher echelon to afford common direction to all North American operations of the company, and to lay down detailed instructions concerning the operation of company stores. It should also be noted that the Canadian company for various services rendered to the subsidiary either directly or through the so-called North American Operations has made service charges against the subsidiary, totaling several million dollars.

In Cannon Mfg. Co. *v.* Cudahy Packing Company, *supra*, in holding that the parent company was not doing business through the subsidiary, the Supreme Court recognized that the parent company exerted its control both commercially and financially over the subsidiary and mainly through the same individuals as it did over those selling branches or departments of its business not separately incorporated. Has the separate identify of the two corporations been preserved here within the limits of that doctrine, or do the special circumstances pointed out above transcend permissible integration so as to require acceptance of the parent's control over the subsidiary as the direct channel by which the parent corporation is transacting business through its subsidiary in this district for the purpose of the Clayton Act. Has the amendment to the Clayton Act worked a liberalization of the Cudahy doctrine in favor of plaintiffs' position?

These questions combine to present a difficult decision on the facts of this particular case. I shall not assume to delineate the line between the permissible and impermissible integration of operations under all circumstances for the purpose of such a decision. It seems sufficient in view of what already has been said to note my judgment that the Canadian company has transcended reasonable limits for insulation of its activities from the Utah operations: that the degree of direct control which it is shown to exert over the company stores in Utah and Idaho if exerted directly by itself would be in disregard of the corporate separation; and that it does not detract from accountability for it to operate through a "North American Operations"

to effectuate that control, since it still is the dominant force through such unit upon the local situations in Utah and Idaho without the protection of separate corporate managements and functions.

What has been said relates primarily to the venue problem, my view being that the Canadian company's connection with the Utah operations on the present record clearly is sufficient to show that it "transacts business" here, as that concept is referred to in Section 12 of the Clayton Act and interpreted liberally in United States v. Scophony Corporation, 333 U. S. 795, 68 S. Ct. 855, 92 L. Ed. 1091 (1948).

It remains to be determined specifically whether the connection of the Canadian company with the Utah operations is sufficient to sustain service of process which was accomplished purportedly upon it through officers and agents directly employed by the American company and conducting the business of the latter with reference to the company stores in Utah and Idaho, and generally.

The key question with regard to service of process seems to be not whether the foreign corporation merely "transacts business" but whether it may be "found" within the district, which involves beyond the minimal showing required for venue purposes something amounting, or at least more akin, to the "doing of business". 15 U. S. C. 22, supra; Rule 4(d) (7), F. R. Civ. P.; Rule 4 (e) (4), Utah Rules Civil Procedure; United States v. Scophony Corporation, supra; People's Tobacco Co. v. American Tobacco Co., supra; Cannon Mfg. Co. v. Cudahy Packing Co., supra; Banana Distributors v. United Fruit Company, S. D. N. Y., 158 F. Supp. 153 (1957); Terry Carpenter, Limited v. Ideal Cement Co., D. C. Neb., 117 F. Supp. 441 (1954); Lawlor v. National Screen Service Corp., D. Pa., 10 F. R. D. 123 (1950); Nagl v. Northam Warren Corporation, D. C. D. Neb., 8 F. R. D. 139 (1948); Berkman v. Ann Lewis Shops, S. D. N. Y., 142 F. Supp. 417 (1956).

Obviously the Canadian company is not an "inhabitant" of this district within the contemplation of the service requirements of Section 12 of the Clayton Act, 15 U. S. C. 22. Was it "found" in either the districts of Utah, Idaho

or Michigan where service of process was attempted through officers and agents of the American company? The question is a most difficult one, but I have concluded that it was, and, upon the theory of that conclusion, that the served officers of the American company were sufficiently the agents also of the Canadian company as to sustain the service of process and the return in question.

I think that my conclusion is not inconsistent with the principles of the above cited cases that a corporation is not amenable to suit in the federal court of another state merely because it employs and controls a wholly owned subsidiary corporation as an instrumentality for doing business there (Cudahy) and that for a contrary result the local business of the foreign corporation must be of such character as to warrant the inference that the foreign corporation has subjected itself to the local jurisdiction and that it is by its duly authorized officers and agents present within the district where service is attempted (People's Tobacco Co.). I think that my conclusion is in harmony with recognized qualifications to these general rules because the existence of the local company "as a distinct corporate entity" is not "in all respects" or even in major respects, "observed" (Cudahy); because in certain respects involving the control of local operations the American company was in fact "an 'agent', 'instrumentality' or 'dummy' of the parent corporation" (Terry Carpenter, Limited); because there was more than "[domination of] the operating domestic subsidiary through its stock ownership * * * and in that connection [more than mere] interorganizational activity by the parent corporation in respect of its operating subsidiary" (Nagl); and because far from being "clear that the separate identities of parent and subsidiary had been carefully preserved", (Berkman) it appears as to certain local operations of the American company that there was such an intermixture of operational control apart from the regular channels of corporate management as to obscure, if not entirely obliterate, the separation of corporate identities.

Moreover, if I am right that by reason of its North American Operations control the Canadian defendant act-

ually is "transacting business" here, it would seem that a line could hardly be drawn between that concept and the "doing business" concept under the peculiar facts of this case. This is not to say that the "transacting business" idea is not narrower than the doing business concept by way of definition. But certain methods of transacting business which meet the former test also may meet the latter, and I think that the method of operation here must be one of these. Were it otherwise it might have to be accepted that a foreign corporation outside the United States could completely integrate its control and corporate functions with the corporate organization, direction and functioning of a United States subsidiary, disregarding abroad any real separation of functions except the most superficial and formal, and thus actually itself conduct day by day business in every detail within the United States, yet where service were attempted, withdraw with impunity beyond the national boundary. I cannot believe that Congress left such a loop-hole in the enforcement of the antitrust law. (See United States *v.* Scophony Corporation, supra). Perhaps it plugged such a hole by permitting some appropriate type of service, assuming venue is established, wherever a defendant corporation can be found, including its home office abroad. But by one means or another I believe that service of the Canadian corporation may be accomplished in such a case as this, and if I am in error in my conclusion that it has already been accomplished or if plaintiffs desire to reinforce their position, that they should be afforded in the interest of a complete determination a further reasonable opportunity to attempt to do so by service of process at the home office of the Canadian company.

Upon the merits of the plaintiffs' charges that the antitrust laws have been violated by the defendants I neither entertain nor express any opinion nor is my holding intended to be broader than the area of, or for any other purpose than, the precise questions before me.

The motions to dismiss and to quash return of service and service of process as to Massey-Ferguson Limited, the Canadian corporation, are denied.

APPENDIX C

Sections of Canada and Ontario Statutes Relating to Obtaining of Testimony For Use in a Foreign Country.

Revised Statutes of Canada (Ch. 307, 1952)

"42. Where, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in any other of Her Majesty's dominions, or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of a party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, the court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in the order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents relating to the matter in question that are in the possession or power of such party or witness."

Revised Statutes of Ontario (Ch. 125, 1960)

"58. (1) Where it is made to appear to the Supreme Court or a judge thereof, or to a judge of a county or district court, that any court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the obtaining of the testimony in or in relation to any action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the

same or by a subsequent order, command the attendance of any person named therein for the purpose of being examined, or the production of any writing or other document or thing mentioned in the order and may give all such directions as to the time and place of the examination, and all other matters connected therewith as may seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in case of an order made by the same court or judge in an action pending in such court or before such judge.'"

Statement of Premier of Ontario to Ontario Legislature, October 27, 1947.

The Premier said in his statement to the Ontario Legislature:

"It must be remembered that these subpoenas were directed to companies and officers of those companies doing business entirely within the Province of Ontario, *except insofar as they may engage in selling activities related to their export business in the United States.* Furthermore, most of the companies in question, if not all, are companies operating under charters issued by the Canadian Government, or by the Provincial Governments of Canada. They are strictly Canadian companies and it happens that they are also companies of the utmost importance to the Canadian economy since their combined production for export constitutes our largest type of export in dollar value.

"First, let us examine the effect of compliance with such a subpoena. It would result in most of the important records . . . being moved outside the jurisdiction of our own company and other laws for an indefinite period. Those records are an essential part of the daily business of great industries giving direct and indirect employment to scores of thousands of Canadian workmen.

"Serious though this result would be, of indefinitely more concern to every Canadian must be the far-reaching implications of such a procedure. *It implies the right of*

the Government of the United States [by a subpoena *duces tecum*] *to invade the territorial integrity of Canada without application to the Canadian Government, to any provincial government, to any Canadian Court, or to any established channel of international representation in regard to international business.* There has been no similar proceeding [of a 'fishing expedition' by a subpoena *duces tecum*] during the long and happy relationship between Canada and the United States which has asserted the jurisdiction of the Government of the United States and of United States Courts over Canadian corporations and individuals doing business within Canada under Canadian laws. These proceedings are particularly improper in view of the fact that we have our own Anti-Combine Laws in Canada under which there are just as wide powers to prevent improper combinations in restraint of trade as are contained in the Anti-Trust Laws of the United States.

"If the Attorney General of the United States does in fact believe that there has been any improper combination in restraint of normal trade, then the correct procedure would be for him to lay the facts in his possession before the proper authorities at Ottawa who could then take such action as was deemed advisable upon the evidence placed before them.

. . . . . .

"This government objects very strongly to fishing expeditions through our own Courts, and it is certainly not prepared to approve of fishing expeditions of this nature into the affairs of our companies through the Courts of the United States in regard to something which is not properly before those Courts.

"That being so, I am introducing a bill which makes it a legal offense to comply with any requirement of a judicial authority outside of Ontario which would cause to be removed from this province to a point outside of Ontario any of the essential records of business being carried on in this province.

. . . . . .

"It may well be asked why such an obvious protection to our own economy and the orderly conduct of business upon which that economy rests should not have been in existence long before this. The simple truth is that at no time in the past has any such extra territorial authority been asserted, and it would appear that no government anticipated the possibility that such an improper proceeding would ever be undertaken.

"I need hardly say that when this Bill becomes law it will affect only companies operating in Ontario. I recognize that in population Ontario is a very small jurisdiction compared with that of the United States. Nevertheless, I trust no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as is any citizen of their own country. I hope that the Government of the United States will see fit to withdraw these proceedings and follow the course which is in keeping with that close international friendship which has been an example to the whole world." Vol. 1, No. 24, 1947 Legislature of Ontario, Debates (Hansard). (Emphasis supplied throughout.)

Ontario "Business Records Protection Act".

Revised Statutes of Ontario (Ch. 44, 1960).

"1. No person shall pursuant to or under or in a manner which would be consistent with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside of Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point within Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report or material in any way relating to any business carried on in Ontario . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 945

MASSEY-FERGUSON LIMITED, a corporation,
Petitioner,

vs.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, CASSIA EQUIP- a corporation, CHISHOLM BROTHERS FARM EQUIPMENT CO., a corporation, and CHARLES W. BULLEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MASSEY-FERGUSON LIMITED, a corporation,

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INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, CASSIA EQUIPMENT CO., a corporation, ELLIOTTS INC., a corporation, CHISHOLM BROTHERS FARM EQUIPMENT CO., a corporation, and CHARLES W. BULLEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents file this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming *per curiam* the judgment of the United States District Court for the District of Utah, holding that the petitioner, Massey-Ferguson Limited, could be sued and served in a private antitrust action commenced in that district under Section 12 of the Clayton Act, 15 U.S.C. §22 (1958).

Jurisdiction and Statute Involved

Respondents agree that petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1254(1) and that the federal statute involved in the determination of the question presented is Section 12 of the Clayton Act, 15 U.S.C. §22 (1958). However, respondents contend that based on the facts as established by the decisions of the lower courts and overwhelmingly supported by the record, petitioner has mis-stated the question presented.*

The Question Presented

The question presented is:

Whether a Canadian corporation can immunize itself from suit and service under Section 12 of the Clayton Act by the mere interposition of a wholly owned American subsidiary when the parent Canadian corporation through its own operational unit has circumvented and overridden the subsidiary and taken direct and detailed control of the business activities conducted in the subsidiary's name.

Statement of the Case

Massey-Ferguson Limited (hereinafter referred to as "LIMITED") and three of its subsidiaries, including its wholly owned subsidiary, Massey-Ferguson, Inc. (hereinafter referred to as "INC.") were named as defendants in a private antitrust action commenced by the respondents in the Utah district. LIMITED is

* In this respect it should be noted that petitioner in its statement of the case, pp. 3-6 of its petition, only makes one citation to the record relating to its business operations.

engaged in the manufacture and distribution of farm and industrial equipment and other related products on a worldwide basis. In 1961, its consolidated net sales were in excess of $500,000,000.00. In the United States, INC. also manufactures farm and industrial equipment and markets this equipment through approximately 2,050 independent franchised dealers and 34 company stores, which are operated by company personnel. It is these company stores, one of which is located at Tremonton, Utah, (R. 17, 28)* that are directly involved in the alleged antitrust violations. INC. also markets, through these company stores and its dealers, products such as balers, rakes, plows, and combines, which are manufactured by LIMITED in Canada. There is no duplication in manufacturing facilities between the two companies (R. 171, 173).

In Canada, LIMITED manufactures farm and industrial equipment and markets this equipment and equipment manufactured by INC. through independent dealers. LIMITED does not operate any company stores in Canada (R. 275).

LIMITED's control and domination of INC.'s American operations goes far beyond the utilization of common management (R. 26, 180) and the formulation of major policy guide lines for its subsidiary (R. 191, 197). In November of 1959, LIMITED integrated its Canadian operations and INC.'s American operations into one operational entity — North American Operations (R. 168, 194, 220, 315, 316). This unit has its own staff of several hundred people (R. 104) and is headquartered as is INC.'s and LIMITED's top manage-

* References to "R" refer to the transcript of record which has been filed by the petitioner pursuant to Rule 21(1) of this Court.

ment in Toronto, Canada. Mr. Staiger, the general manager of North American Operations, President of INC. and Vice-President of LIMITED (R. 25, 95) stated that North American Operations is one of LIMITED's operating units (R. 103) and further confirmed LIMITED's direct control of North American Operations when he testified:

> Q. "And who is your immediate superior as general manager of the North American Operations unit?
>
> A. "All general managers of all operations report directly to the President of Massey-Ferguson Limited." (R. 103)

North American Operations controls the manufacturing and marketing operations of both LIMITED in Canada and INC. in the United States (R. 168). This control is clearly demonstrated by the RETAIL STORE OPERATIONS MANUAL (Pl. 1 Ex. 2) which is promulgated by the North American Operations unit and governs the operations of the company stores in the United States in minute detail.

The District Court found that "as a practical matter the parent company through the 'North American Operations' directs the detailed activities of the American company, including the operation of company stores in both Utah and Idaho." Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 935 (D. Utah 1962) and further that

> "this 'North American Operations' appears to be not merely a council of officers from the respective corporations, each acting in separate capacities and with respect only to the particular corporation which he represents, but essentially

> another entity in which separate corporate functions are merged in many respects, employing as such numerous assistants and employees and often acting directly with subsidiary corporate activities rather than through the top management of the respective corporations." *Id.*

Based on these findings, the District Court held that Massey-Ferguson Limited was subject to suit and service in Utah and that it was also validly served in Idaho and Michigan.

The Court of Appeals affirmed the District Court's judgment per curiam and agreed

> "with the Trial Court that by reason of its interlocking and integrated control of 'North American Operations' the appellant Canadian corporation was enabled to and did direct 'the detailed activities of the American corporation including the operation of company stores in both Utah and Idaho' . . ." *Massey-Ferguson Limited v. Intermountain Ford Tractors Sales Co.*, 325 F.2d 713, 714 (10th Cir. 1963).

The petitioner does not seek to review the findings of the District Court which have been approved by the Tenth Circuit and it is these findings which present the question that is subject to this Court's discretionary appellate jurisdiction. Respondents contend that the question presented on the findings of the lower court is not worthy of review by this Court.

Reasons for Denying the Writ

I.

The Court of Appeals correctly applied the controlling decision of this Court.

On the question presented, *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948) and not

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) is the controlling decision of this Court.

Petitioner asserts, as it has in the lower courts, that the tests of venue and service under Section 12 of the Clayton Act are controlled by *Cannon Mfg. Co. v. Cudahy Packing Co.*, supra. The *Cudahy* case was not an antitrust case and did not involve the application of Section 12 of the Clayton Act or of Section 12's predecessor provision, Section 7 of the Sherman Anti-Trust Act. *Cudahy* involved the question of the service of process in a diversity action on the parent corporation of a subsidiary that was unquestionably subject to service. The Court held that the parent was not subject to service even though the subsidiary was dominated by the parent through interlocking management. The Court, however, did find that the subsidiary was not acting as the agent of the parent, *Ibid.* at p. 335, and that the corporate separation "though perhaps formal was real." *Ibid.* at p. 337.

While some question may exist as to the current vitality of the *Cudahy* doctrine as it controls service of process in non-antitrust cases, compare *Curtis Pub. Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962) with *Harris v. Deere & Co.*, 223 F.2d 161 (4th Cir. 1955), this Court has already determined that this doctrine does not supply the test of venue and service under Section 12 of the Clayton Act.

In *United States v. Scophony*, this Court reversed a district court decision and held that in an antitrust case a British corporation, whose American subsidiary had been made a party to the litigation, could be sued and served in the Southern District of New York under Section 12 of the Clayton Act. The Court in examining

the standards that control venue and service in civil antitrust suits against corporations stated that the venue requirements of Section 12 had been adopted by Congress to slough off the highly technical distinctions that prior cases had glossed upon the standard "resides or is found" of Section 7 of the Sherman Anti-Trust Act. The Court found that in Section 12, Congress had adopted a "practical, everyday business or commercial concept of doing or carrying on business of any substantial character . . ." *Ibid.* at p. 807, as the test of venue. The Court noted that such a test made effective Congress' remedial purpose in enacting Section 12 by relieving

> "persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." *Ibid.* at p. 808.

The Court in reaching its decision expressly rejected Cudahy as establishing the test of venue under Section 12. The Court had been urged to follow the "Court's decisions interpreting 'found' under Section 7 and similar requirements in application to manufacturing and selling companies[23] . . ." *U.S. v. Scophony Corp. of America*, supra, at pp. 812-813. The first case cited by the Court in footnote 23 as an example of a decision that set forth such "similar requirements" applicable to "manufacturing and selling companies" was *Cannon Mfg. Co. v. Cudahy Packing Co.*, supra. The Court rejected this authority stating "obviously this view . . . of the determinative legal approach is at wide variance from the ones we have taken in dealing with the question of venue." *U.S. v. Scophony Corp. of America*, supra at p. 813.

This Court in *Scophony*, moreover, not only rejected *Cudahy* as supplying the test of venue under Section 12, it also rejected *Cudahy* as supplying the test of service under Section 12. The defendant in *Scophony* in support of its position on service relied on language in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) which indicated that in regard to service of process, Section 12 merely carried forward pre-existing law. This Court in *Scophony* characterized the language in *Eastman* as "no more than dictum" *United States v. Scophony Corporation of America*, supra, at 809, and noted that under Section 12, service on domestic corporations such the defendant in *Eastman* did not involve a practical problem of private antitrust enforcement. While the Court declined to pass on the *Eastman* dictum, it decided that Section 12 did not adopt the doctrine of the "manufacturing and selling cases," e.g., *Cudahy*, as the test of service. In this respect, this Court in *Scophony* said:

> "For present purposes those decisions (the manufacturing and selling cases) may be left untouched for the facts and situations in which they have arisen and to which they have been applied. But there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one, comprehended within neither their rulings nor their effects. More especially would such an extension be inappropriate, when it is recalled that §12 governs venue and service in antitrust suits against corporations. For, in cases against companies incorporated outside the United States, that extension would bring back all the obstacles to enforcement of antitrust policies and remedies which existed for domestic corporations before §12 was enacted to give relief from those obstacles. Even though venue were clearly estab-

> lished, as here, the extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are 'inhabitants.' We are unwilling to construe §12 in a manner to bring back the evils it abolished, for situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the anti-trust laws, so as to make another amendment necessary." *Ibid.* at p. 817 (Material in parentheses added).

Contrary to the petitioner's contention (Pet. Br. at p. 8) businessmen in the United States and abroad need have no doubt as to whether Cudahy supplies the determinative tests of venue and service under Section 12 of the Clayton Act — for this Court has told them it does not. The petitioner not only has failed to show a conflict between the Tenth Circuit's decision in this case and the controlling decision of this Court, but it has failed to show any conflict between the Tenth Circuit's decision and the decisions of other Circuit Courts dealing with the scope of the venue and service provisions of Section 12 of the Clayton Act. The petitioner has relied on three Circuit decisions to establish such a conflict, but not one of these decisions relied on involves the application of either the service or venue provisions of Section 12 of the Clayton Act. See *Manville Boiler Co. v. Columbia Boiler Co. of Pottstown*, 269 F.2d 600 (4th Cir. 1959); *Harris v. Deere and Company*, 223 F. 2d 161 (4th Cir. 1955); and *Gravely Motor Plow & Cultivator Co. v. H. F. Carter Co.*, 193 F.2d 158 (9th Cir. 1951.)

On the basis of authority, the only issue as to whether certiorari should be granted is whether the Tenth Circuit decision correctly followed this Court's

decision in the *Scophony* case. In view of LIMITED's unique domination and control of INC.'s American operations, including the company stores, through its operating unit, North American Operations, the only conclusion that could be drawn under the "practical everyday business" test of *Scophony* was that LIMITED was subject to suit in the Utah District. Moreover, regardless of whether any difference exists between the test of venue and service under Section 12, the Tenth Circuit under *Scophony* was also correct in holding that the petitioner was subject to service. To hold otherwise would have exalted corporate fiction over the realities of petitioner's method of doing business, and thus have permitted foreign corporations to evade the enforcement of our antitrust laws. It was to avoid such evasion that the Supreme Court rejected the *Cudahy* doctrine in *Scophony* as a test of service on foreign corporations.

II.

The decision of the Tenth Circuit is supported by settled considerations of public policy.

The decision of the Tenth Circuit does not hold every foreign parent corporation subject to suit and service under Section 12 merely as a result of its stock interest in a domestic subsidiary corporation. The decision of the Tenth Circuit does hold a foreign parent corporation subject to antitrust enforcement, when such foreign parent corporation in the exercise of its business judgment decides to circumvent and override its domestic subsidiary's control of the domestic operations conducted in the subsidiary's name.

Such a decision will not as claimed by petitioner result in "extraordinary expansion of the jurisdiction of Federal courts." On the contrary, such decision is necessary to prevent evasion of our antitrust laws by foreign corporations and to implement Congressional policy in enacting Section 12. Section 12, as this Court noted in *Scophony*, was enacted to relieve persons of the "often insuperable obstacles" of resorting to distant forums for redress of wrongs inflicted in the places of their business. Thus the Court in *Scophony* recognized that if private antitrust suits are to aid the public in the enforcement of the antitrust laws, then private persons must be given an effective opportunity to seek redress for claimed violations. These considerations have peculiar force in regard to foreign corporations since the application of Section 12 to such corporations will determine not only where such corporations can be sued, but whether they can be sued at all. The opportunity to sue foreign parent corporations, moreover, may well be essential to successful antitrust enforcement not only against the parent corporation, but also against the foreign parent corporation's domestic subsidiary.

Section 12 does not provide for suit and service in personal injury actions. It is not a question, as petitioner intimates, of whether a subsidiary can satisfy a judgment. The question is whether a plaintiff can properly prepare and prosecute its antitrust claims involving the integrated business operations of a foreign parent corporation which utilizes domestic subsidiaries in such operations but actually controls all such operations itself without making the parent corporation a party. In this case, for instance, discovery against LIMITED has been stayed pending the outcome of this interlocu-

tory appeal. Such discovery in litigation where the "proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot." *Poller v. C.B.S.*, 368 U.S. 364 (1962) will undoubtedly be essential to the prosecution of respondent's claims. It is not enough to say, as petitioner argues, that "all civilized countries" have procedures for collecting information for use in foreign litigation. Such procedures may be inadequate, see *Societe' Internationale v. Rogers*, 357 U.S. 197 (1958) and statement of Premier of Ontario (Pet. Br. p. 44), or the utilization of such procedures may be impossible as a practical matter.

In light of the Congressional policy in enacting Section 12 and in light of the well settled public policy of encouraging private enforcement of our antitrust laws, no further decision of this Court is necessary to determine that a foreign corporation cannot utilize a domestic subsidiary to evade the enforcement of our antitrust laws, and on the question presented, that is the only consequence of the Tenth Circuit's decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Dated: April 20, 1964.

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INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, *et al.*,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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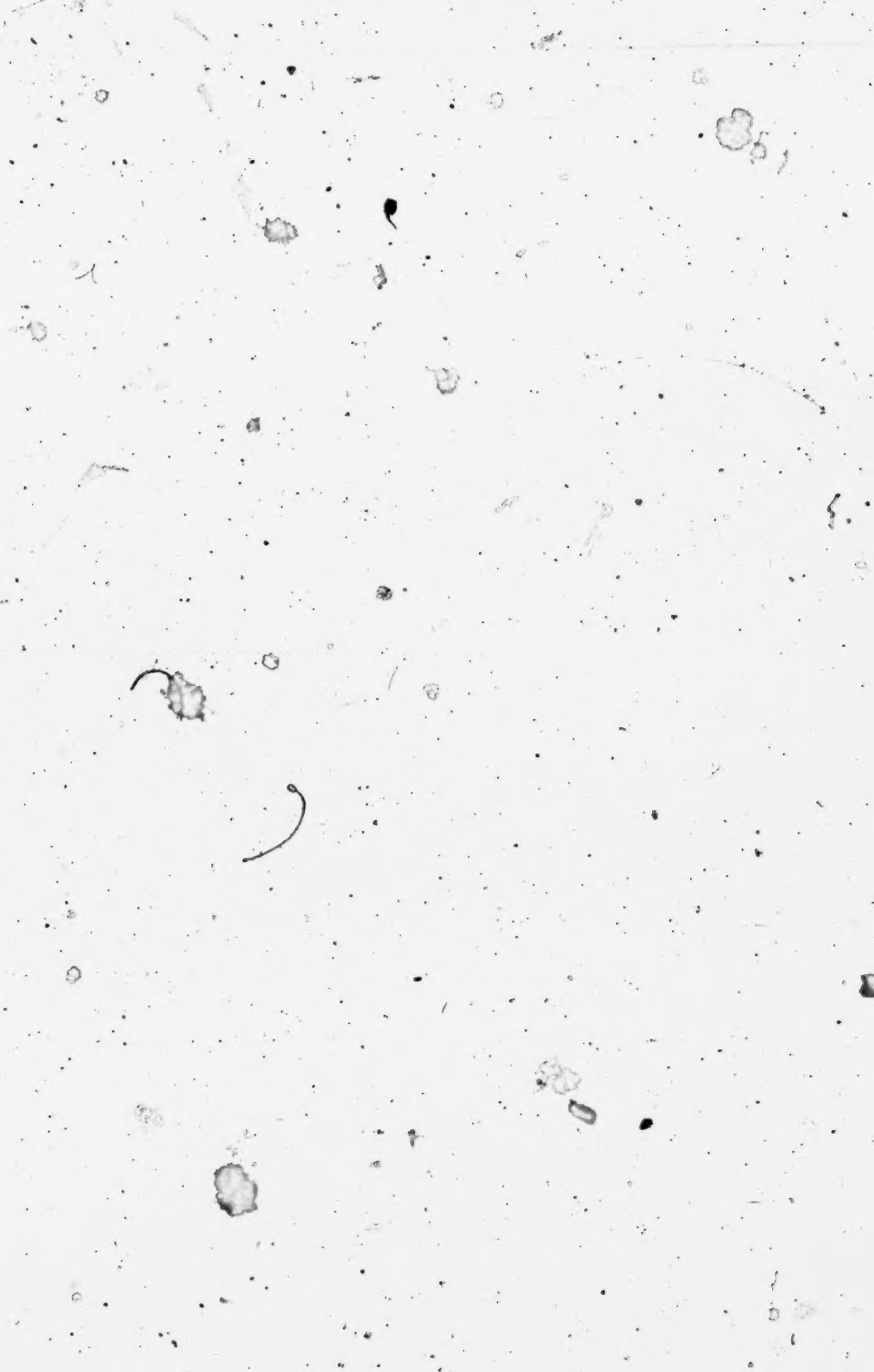

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 945.

MASSEY-FERGUSON LIMITED, a corporation,
Petitioner,

v.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, *et al.*,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

This reply brief is submitted to correct certain overstatements in respondents' brief in opposition.

Petitioner Has Correctly Stated The Question Presented

The question presented is, as stated in the petition:

> "Where a Canadian corporation transacts no business in the United States, may it be sued and served in a private antitrust suit in the United States solely because it controls and is able to 'direct the detailed activities' of its wholly owned subsidiary which transacts business and is found in the United States, where the subsidiary has also been named as

> a party, has appeared to defend and is capable of responding to any judgment which may be entered?"

There is no issue here, as respondents suggest, of an attempt to "immunize" petitioner from suit by the "mere interposition" of a subsidiary which has been "circumvented and overridden" to "evade the enforcement of our antitrust laws" (Brief in opposition, pp. 2, 10, 12). This suggestion is respondents' invention. Neither the language of the Court of Appeals, as quoted by petitioner, nor the language of the District Court suggests any such attempt at evasion. The decision of the Court of Appeals makes the existence of control over detailed activities of a subsidiary sufficient to make the parent corporation subject to suit and service—without any showing of an attempt to evade the law.

In fact, the record affirmatively shows the absence of any attempt to evade the law by petitioner. Petitioner's subsidiary, Massey-Ferguson Inc., has not contested the jurisdiction of the court. It has appeared to defend the action, and is defending vigorously. Any relief to which plaintiffs could conceivably be held entitled can be obtained from the subsidiary. The subsidiary's assets are more than fifty times the amount of the *ad damnum* alleged. Any injunction against the subsidiary will, under Federal Rule 65(d), be binding upon all persons in active concert or participation with it who receive actual notice of the order by personal service or otherwise.

These practical facts dispose of respondents' principal contention, which is that the Court of Appeals' decision is necessary to carry out a Congressional purpose of relieving "persons injured through corporate violations of the antitrust laws from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places

of their business." *United States* v. *Scophony Corp.*, 333 U. S. 795, 808 (1948). This situation is simply not presented here. Plaintiffs are suing in the forum of their choice,* will obtain redress there if, contrary to defendants' contentions, they are entitled to any, and face no insuperable obstacles in the preparation or presentation of their case. There is no support in either decision below or in the record for any suggestion that plaintiffs have sought to bring petitioner into the litigation only because they have been unable to obtain evidence from the subsidiary by the usual procedures provided in the Federal Rules or from the petitioner by the usual procedures provided in Canadian law.

Plaintiffs have in fact obtained extremely extensive discovery from the subsidiary, including depositions of its executives and examination of its documents. Plaintiffs have already been furnished many thousands of documents, including cost information, operating statements, invoices and many other documents relating to retail store operation. Plaintiffs made no efforts to invoke the Canadian discovery procedures against petitioner, but joined petitioner as a party from the outset of the proceeding, for no apparent purpose other than to obtain discovery without compliance with Canadian procedures. On numerous occasions plaintiffs have stated their keen interest in going to Toronto to examine petitioner's senior officers, who are responsible for coordinating operations of petitioner's affiliates around the world. As the principal issue in the litigation is whether excessive trade-in allowances were given on farm equipment at stores in Burley and Idaho Falls, Idaho, the impor-

* This happens to be the District of Utah, not the District of Idaho, where most of the allegedly unlawful acts took place, where three of the five plaintiffs have their places of business, and where Massey-Ferguson Inc. has a branch office and a number of retail stores.

tance of such examinations to the preparation of plaintiffs' case is questionable, but plaintiffs are free to move for them under Canadian law.

Thus petitioner has correctly stated the question presented. There is no question here of "evasion" of United States law by petitioner. The only question of evasion is that presented by respondents' evident reluctance to invoke Canadian discovery procedure.

The Court of Appeals Did Not Apply *Scophony*.

The chief reason advanced by respondents for denying the writ is that "The Court of Appeals correctly applied the controlling decision of this Court," referring to *United States v. Scophony Corp.*, 333 U. S. 795 (1948). This is not borne out by the Court of Appeals' opinion. The opinion does not cite *Scophony* or any other decision of this Court, although respondents urged before the Court of Appeals, both in opposing grant of permission to appeal and in argument on the merits, that *Scophony* controlled the questions before the Court.

There was ample reason for the Court of Appeals' failure to rely on *Scophony*.

In the first place, *Scophony* did not hold that the parent could be sued because of the degree of control exercised by the parent over the subsidiary. *Scophony* held rather that the parent corporation through its representative was present in the district. 333 U. S. at 810, 816, 818. The Court stated pointedly that Elcock, the person served, "in view of his triple position as mortgagee, corporate officer, and attorney-in-fact, . . . for all relevant purposes at this phase of *Scophony's* activity . . . was the company." 333 U. S. at 816. Thus the question presented in this case—whether the parent comes within the statute because of

control over the subsidiary's activities—was not decided by *Scophony*.

Secondly, the Court of Appeals could not have treated the *Cudahy* doctrine as "rejected" in *Scophony*, as respondents state on page 10 of their brief, because this Court in *Scophony* explicitly "left untouched" the *Cudahy* doctrine, 333 U. S. at 817, 813 n. 23, for use in cases, unlike *Scophony*, involving manufacturing and selling companies. *Scophony* involved a company whose only activity was licensing, and that company was at the time of service engaged, through its own representative and not a subsidiary, in carrying on in the district "largely if not exclusively the only business" it had. 333 U. S. at 810. To construe *Scophony* as overruling *Cudahy* would thus be permitting the decision in an uncommon and virtually unique situation* to control the decision in the much more frequently encountered situation present in *Cudahy*-type cases, contrary to the express statement of the Court.

Thirdly, the Court of Appeals could not have treated *Cudahy* as "rejected" by *Scophony* without placing itself in express disagreement with the multitude of cases, including certain of those cited at pages 9-11 of the petition, which have not treated *Scophony* as overruling *Cudahy*.

In short, the Court of Appeals did not adopt respondents' contention that *Cudahy* was "rejected" in *Scophony*. Instead the Court of Appeals made important new law without explaining the basis for its action. This new law is contrary to that applied in this and other Courts, and will have a significant effect on the course of private antitrust litigation and on relations with foreign countries for many years.

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* Characterized by the Court as "different and distinct", 333 U. S. at 817.

The Question Presented is Important.

Although respondents' brief in opposition denies that the question presented is "worthy of review" (page 5), various statements in the brief underscore the need for review.

Respondents state "businessmen in the United States and abroad need ~~have~~ no doubt as to whether *Cudahy* supplies the determinative tests of venue and service under Section 12 of the Clayton Act—for this Court has told them it does not" (Brief in opposition, p. 9). If this were true, the quandary of the businessmen would be all the greater—for several district courts have subsequently told them that it does. *Terry Carpenter Ltd.* v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Austad* v. *United States Steel Corp.*, 141 F. Supp. 437, 439 (N. D. Cal. 1956); *Lawlor* v. *National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950). All these decisions arise under Section 12 and apply *Cudahy*, referring to *Scophony* on other points.

Respondents state that the decision below will not result in extraordinary expansion of the jurisdiction of the federal courts (Brief in opposition, p. 11). Yet in the very next breath, respondents defend the decision because it makes possible suits which might otherwise be impossible.

Finally, respondents' brief pinpoints the impact of the decision below on international relations. Respondents attempt to explain their reluctance to try to use the applicable foreign procedures because "such procedures may be inadequate" or impossible of utilization (Brief in opposition, p. 12). In this backhanded way, respondents admit that the effect of the decision will be to permit lengthier or more far-reaching examination than would be available from courts at the witnesses' residence. This is precisely the type of activity which, when engaged in by the United States Government, provoked the protests

described at pages 18-19 of the petition herein. Respondents wish, for their private purposes, the power to provoke similar international outcries whenever it suits their strategy to do so. Respondents demand this power without making any effort to obtain discovery from the appropriate foreign courts having jurisdiction or demonstrating that reasonable discovery is unavailable for any reason. Whether Congress intended to place such power in the hands of treble-damage litigants is clearly a question worthy of review by this court. The accommodation of the respective interests of United States and foreign courts is surely as much a concern of this Court as the accommodation of the respective interests of federal and State courts within the United States.

Conclusion

Respondents' brief in opposition suggests that petitioner is attempting to evade the law and that the decision below is merely an application of an earlier decision of this Court. These suggestions are erroneous. No such attempted evasion by petitioner has been intimated by the courts, and it is petitioner, not respondents, which seeks to have the decision of this Court applied to permit businessmen to plan with certainty, and to prevent a substantial expansion of federal jurisdiction and unwarranted interference with the exercise of foreign sovereignty.

Respectfully submitted,

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Dated: April 28, 1964.